

JU 13.2:R 86/2

Report of a  
Survey  
Concerning  
Rule 11,  
Federal Rules  
of Civil  
Procedure

FEDERAL JUDICIAL CENTER

COMPLETED

1995

# Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure

*John Shapard, George Cort,  
Marie Cordisco, Thomas Willging,  
Elizabeth Wiggins & Kim McLaurin*

Federal Judicial Center

1995

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

## Introduction

At the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, the Federal Judicial Center surveyed attorneys and judges concerning Rule 11 of the Federal Rules of Civil Procedure. The survey sought respondents' views of the effects of Rule 11 before 1993, the effects of amendments to Rule 11 that became effective December 1, 1993, and the merits of proposals that would in large measure reverse the 1993 amendments. This is the report of the results of that survey.

Among other changes, the 1993 amendments (1) provided that the purpose of Rule 11 sanctions is solely the deterrence of objectionable filings; (2) created a "safe harbor" against sanctions for filings that are withdrawn; (3) made the imposition of sanctions discretionary; (4) allowed filing of factual contentions absent evidentiary support, as long as they are likely to have evidentiary support after discovery; and (5) removed discovery-related activity from the scope of the rule. Proposed legislation would reverse each of those changes and would provide that sanctions imposed must include payment to the other party of all reasonable expenses incurred as a direct result of the filing.<sup>1</sup> Debate about Rule 11 has been based in part on a 1991 Federal Judicial Center survey of judges that indicated general support for Rule 11 at that time.<sup>2</sup> The survey reported here was designed, in part, to elicit judges' current views based on their experience with the 1993 amendments. It should be noted that the questionnaire generally limited its focus to the choice between the existing rule and proposed changes. It does not address any other changes that might be proposed and possibly preferred by many judges and lawyers.

On June 19, 1995, questionnaires were mailed to representative samples of 1,130 federal trial attorneys and 148 federal district judges.<sup>3</sup> Appendix A explains the method for choosing these samples. Appendix B contains the questionnaires used in the survey. The questions asked judges and attorneys were as identical as possible, but it should be recognized that judges and attorneys may have different perspectives on Rule 11, not only because of their different roles in the litigation process but also because most attorneys work primarily on certain types of cases (e.g., personal injury) whereas judges have experience with many different types of cases. If particular problems commonly occur in a given type of case, such prob-

1. See, e.g., The Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. (1995).

2. See Elizabeth C. Wiggins et al., Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States (Federal Judicial Center 1991).

3. A reminder and new questionnaire were mailed on July 24, 1995, to those who had not responded as of 12:00 PM that day. Responses were received from 82% of judges and 52% of attorneys.

lems would be known to most or all judges but only to attorneys who handle that type of case.<sup>4</sup>

The survey responses suggest that a majority of attorneys and judges generally oppose the proposed changes to Rule 11, with one notable exception: A majority of judges and defendants' attorneys, and a near majority of plaintiffs' attorneys, believe that the purpose of Rule 11 sanctions should encompass compensation of parties injured by violations of Rule 11 as well as deterrence of such violations. However, a majority of all three groups believe that sanctions should not be mandatory for any violation and that compensation should not be mandatory when a sanction is imposed.

## Results

The questionnaire was addressed quite pointedly to the concerns about Rule 11 that were at issue when the 1993 amendments were recommended by the Advisory Committee on Civil Rules of the Judicial Conference of the United States. The proposed legislation puts these concerns in issue once again. These five core concerns provide the organization for this section.

### **Is there a problem with groundless litigation, and has that problem increased or decreased since the 1993 amendments?**

When asked about the extent of problems with groundless litigation, a majority of judges and attorneys described the problem as no larger than "small." Of course, these judgments pertain to a context where Rule 11 may effectively dissuade filing of groundless pleadings. A very large majority of respondents agree that some form of Rule 11 is needed, suggesting that those who regard the problem with groundless litigation as small believe Rule 11 keeps it from being a larger problem.<sup>5</sup> Although there appears to be significant agreement between judges and defendants' attorneys, with both reporting moderate or large problems much more frequently than plaintiffs' attorneys, it is important to note that judges and attorneys may be responding to this question from very different

4. In drafting the questionnaire, we sought to promote considered answers by explaining briefly the proponents' and opponents' views of alternative proposals. In doing so, although we tried to assure that the statements were balanced and unbiased, we clearly risked creating unintended bias. We designed the statements to summarize fairly the arguments on both sides. The length of a statement on one side or the other is simply a product of the amount of explanatory material needed. For example, it takes many words to describe a change like the safe harbor provision, but few words to communicate the meaning of a repeal of the same provision. The wording of the statements reflects the belief that short statements can be at least as persuasive as long ones.

5. See the heading "General views about Rule 11," *infra* p. 7.

perspectives. As explained earlier, if existing problems with groundless litigation occur primarily in certain types of cases, then only attorneys who handle those types of cases will report these problems. However, it is likely that most or all judges will be aware of them.

Table 1

Is there a problem with groundless litigation in federal civil cases in which you serve as counsel? [*for judges: on your docket?*]

Possible Answer	Judges (N = 122) <sup>6</sup>	Plaintiffs' Attorneys (N = 173) <sup>7</sup>	Defendants' Attorneys (N = 271)	Other Attorneys (N = 124)
There is no problem	3%	39%	10%	19%
There is a very small problem	26%	31%	22%	28%
There is a small problem	31%	19%	29%	23%
There is a moderate problem	24%	5%	24%	22%
There is a large or very large problem	16%	2%	13%	4%

When asked whether the problem with groundless litigation had changed since the 1993 amendments to Rule 11, very few judges or attorneys indicated that the problem is now larger. Most judges and attorneys indicated that the problem either never existed or is the same or smaller than it was before 1993.

Table 2

How has the problem of groundless litigation in civil cases changed since Rule 11 was amended in 1993?

Possible Answer	Judges (N = 122)	Plaintiffs' Attorneys (N = 172)	Defendants' Attorneys (N = 271)	Other Attorneys (N = 124)
There has never been a problem	3%	30%	5%	12%
The problem is larger now	9%	1%	10%	5%
The problem is the same now	68%	31%	53%	48%
The problem is smaller now	14%	11%	12%	13%
I can't say	6%	27%	20%	23%

6. N represents the number of respondents who answered the question. The value of N varies slightly from table to table because of variation in the number of respondents (usually one or two) failing to answer the question.

7. Attorneys were asked whether they primarily represented plaintiffs or defendants in their civil practice. Those who said they represent plaintiffs more often than defendants are called "plaintiffs' attorneys." Those who more often represent defendants are called "defendants' attorneys," and those who represent about the same number of plaintiffs and defendants are called "other attorneys."

### Is the "safe harbor" provision supported, and how has it affected judicial workload?

The 1993 amendments to Rule 11 provide a "safe harbor" so that a party cannot be subjected to sanctions on the basis of another party's Rule 11 motion unless, after receiving the motion, the party refuses within twenty-one days to bring its actions into compliance with Rule 11. Proposed legislation would eliminate the safe harbor provision. Opponents have argued that the safe harbor provision unduly weakens the deterrent against filing groundless claims, while proponents of the provision believe that it leads to the efficient resolution of issues with less court involvement and gives parties incentives to withdraw or abandon questionable positions.

When asked whether they support or oppose the safe harbor provision, a notable majority of judges (70%) and attorneys (68% overall: 61% of defendants' attorneys and 80% of plaintiffs' attorneys) indicated that they either moderately or strongly support it.

Table 3

Do you oppose or support the inclusion of a safe harbor provision in Rule 11?

Possible Answer	Judges (N = 122)	Plaintiffs' Attorneys (N = 172)	Defendants' Attorneys (N = 273)	Other Attorneys (N = 123)
Strongly oppose	7%	8%	10%	9%
Moderately oppose	9%	6%	17%	15%
Moderately support	38%	19%	33%	29%
Strongly support	32%	61%	28%	38%
I find it difficult to choose	9%	5%	8%	2%
I can't say	5%	2%	4%	7%

Judges were also asked whether the safe harbor provision had affected the amount of Rule 11 activity on their dockets. The vast majority indicated that Rule 11 activity either remained the same (37%) or decreased (39%). Only two judges thought the safe harbor provision had resulted in more Rule 11 activity, and 23% were unable to answer the question.<sup>8</sup>

### Should the rule require that factual allegations have evidentiary support at the time of filing?

The 1993 amendments to Rule 11 changed the certification standards for factual allegations to permit not only factual contentions that have evidentiary support at the time of filing, but also factual contentions that

8. The questionnaire was sent only to judges who had been appointed to the bench before 1993, but some may have had insufficient experience with the pre-1993 rule to answer the question. Moreover, even if Rule 11 activity had changed since the 1993 amendments, some judges might not be confident that the safe harbor provision had caused the change.



are specifically identified as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Proposed legislation would repeal that change and thus require that all factual contentions have evidentiary support at the time of filing.

Proponents of the 1993 change argue that it was needed to avoid deterring meritorious filings in which a prefiling inquiry uncovers apparent facts that need discovery or further investigation to provide evidentiary support. Opponents argue that the change permits groundless papers to be filed without an adequate prefiling inquiry.

A large majority of plaintiffs' attorneys favored the current provision of Rule 11 permitting filing of factual allegations "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Judges and defendants' attorneys, however, were about equally split between support for the current rule and support for the proposed change. Judges were more likely than plaintiffs' or defendants' attorneys to report that the pros and cons of the 1993 amendment are about equally balanced.

Table 4

Which of the following actions do you think would be fairest to all parties in the cases with which you are experienced?

Possible Answer	Judges (N = 122)	Plaintiffs' Attorneys (N = 173)	Defendants' Attorneys (N = 272)	Other Attorneys (N = 123)
Keep Rule 11 as it is	40%	79%	45%	68%
Require that all factual contentions have evidentiary support at the time of filing	38%	12%	40%	20%
I find it difficult to choose, because I think the pros and cons of the 1993 amendment are about equally balanced	17%	4%	10%	8%
I can't say	5%	5%	5%	4%

### Purpose and requirements for Rule 11 sanctions

The 1993 amendments to Rule 11 state that sanctions imposed for violation of the rule shall be limited to what is sufficient to deter similar violations, and they permit sanctions that compensate the injured party only when necessary for effective deterrence. Moreover, the 1993 amendments leave to the court's discretion whether to impose any sanction for a violation of the rule. Proposed legislation would reverse these aspects of the amendments by requiring that Rule 11 sanctions (1) compensate as well as deter, (2) be imposed for any violation of the rule, and (3) include an award of attorneys' fees sufficient to compensate the injured party. The survey respondents indicated support only for changing the purpose of the rule to include compensation as well as deterrence.

Table 5

Affirmative response to proposed changes in aspects of Rule 11

Proposed Change	Judges (N = 122)	Plaintiffs' Attorneys (N = 171)	Defendants' Attorneys (N = 273)	Other Attorneys (N = 123)
Purpose of Rule 11 sanctions should include compensation as well as deterrence	66%	43%	63%	66%
The court should be required to impose a sanction when a violation is found	22%	24%	27%	25%
When a sanction is imposed, the sanction should be required to include an award of attorneys' fees sufficient to compensate the injured party	15%	21%	34%	31%

**Should sanctions for violation of rules concerning discovery be governed only by the discovery rules, only by Rule 11, or by both discovery rules and Rule 11?**

The 1993 amendments to Rule 11 removed discovery-related activity from the scope of the rule, largely because Federal Rules of Civil Procedure 26(g) and 37 establish certification standards and sanctions for discovery matters. Proposed legislation would reverse the amendments and include discovery-related activities within the scope of Rule 11 once again; thus sanctions for violations of discovery rules would be governed both by Rule 11 and by Rules 26(g) and 37. The questionnaire asked about these options, as well as about a third option that might be said to exhaust the set of possibilities—consolidating sanctions matters in Rule 11 and eliminating them from Rules 26(g) and 37. Pluralities in all groups favor the approach adopted in the 1993 amendments, although a small but notable percentage of each group thinks discovery-related sanctions provisions should be covered in both Rules 26(g) and 37 and Rule 11. There is little support for consolidating the provisions in Rule 11 and eliminating them from Rules 26(g) and 37.



Table 6

Which would be the best option for sanctions provisions related to discovery?

Possible Answer	Judges (N = 122)	Plaintiffs' Attorneys (N = 174)	Defendants' Attorneys (N = 272)	Other Attorneys (N = 123)
They should be covered only in Rules 26(g) and 37 (the current rule)	48%	59%	49%	54%
They should be covered in both Rules 26(g) and 37 and Rule 11	33%	12%	27%	19%
They should be consolidated in Rule 11 and eliminated from Rules 26(g) and 37	6%	9%	6%	4%
There is no significant difference among the three options	8%	10%	9%	12%
I can't say	6%	11%	9%	11%

### General views about Rule 11

Finally, we asked respondents a very general question about whether and in what direction Rule 11 should be modified, in light of factors other than Rule 11 (e.g., informal admonitions, Rule 16 conferences, 28 U.S.C. § 1927, prompt dismissal of groundless claims) that may deter or minimize the harmful effects of groundless assertions or arguments. The vast majority agreed that Rule 11 is needed in some form, but there are notable differences among respondents whether and in what respect the rule should be modified.

Table 7

How, if at all, should Rule 11 be modified?

Possible Answer	Judges (N = 121)	Plaintiffs' Attorneys (N = 174)	Defendants' Attorneys (N = 270)	Other Attorneys (N = 123)
Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings)	32%	11%	37%	24%
Rule 11 is needed, and it is just right as it now stands	52%	41%	37%	40%
Rule 11 is needed, but it should be modified to better avoid deterring meritorious filings (even at the expense of failing to deter some groundless filings)	7%	27%	12%	16%
Rule 11 is not needed	4%	12%	4%	10%
I can't say	5%	9%	10%	10%

## Appendix A Method

Questionnaires, in three forms, were sent to samples of 1,130 attorneys and 148 federal district judges:

- All judges received identical questionnaires, which included one experience question not asked of lawyers.
- All lawyers received the same questionnaire, which included one experience question not asked of judges.
- Approximately half of the lawyers received questionnaires with answer spaces adjacent to the questions and the rest received questionnaires with separate answer sheets.<sup>9</sup> The questionnaires are reproduced in Appendix B.

The attorney questionnaires were produced in two different formats to test whether return rates or responses from attorneys would differ as a function of questionnaire form. Both to facilitate prompt completion of the survey and to reduce expenses, we employed personal computer software to automatically read the responses to questionnaires returned to us by facsimile machine (we established a toll-free 800 telephone number for the faxed returns). This avoids the labor that would otherwise be required to enter the questionnaire responses into our computer. This savings may be at least somewhat offset, however, by the long distance telephone expenses associated with questionnaires returned by fax. The cost of a fax return exceeds the postage necessary for questionnaires returned by mail when the returned document exceeds three pages in length.<sup>10</sup> Because a single answer sheet is sufficient to record responses for even a lengthy questionnaire (most of which is taken up by the questions, not the answers), we wanted to compare the success of using a single answer sheet with the standard approach we have used in the past, where the answers are indicated on the questionnaire itself and the full document is returned to us. We were concerned that the answer sheet approach might suffer from reduced response rates because of its imper-

9. To avoid confusion from receipt of different questionnaire forms by attorneys in the same office, we sent one form to attorneys with odd-numbered zip codes and the other to those with even zip codes. Hence the two groups were not exactly equal in size: 521 received the regular format questionnaire, and 609 received the separate answer sheet form.

10. This is a rough guideline. We currently pay \$0.16 per minute for long distance calls within the United States, and with most fax machines the transmission time is less than one minute per page. We pay regular first-class mail rates for returned questionnaires, usually by including a postage-paid return envelope with the questionnaire, so we pay postage for each such envelope, whether or not returned, which increases the overall unit price per returned questionnaire. With faxed responses, we pay telephone charges only for questionnaires actually returned.

sonal character and because of unpleasant memories of separate answer sheets in standardized tests (e.g., the multistate bar exam).<sup>11</sup>

The response rates did not differ notably between the two different questionnaire formats. Responses were received from 52% of attorneys sent the separate answer sheet form and from 51% of those sent the standard form. The difference is not statistically significant.

### **Sample of attorneys**

The questionnaires were sent to all attorneys listed as lead counsel of record in a particular sample of civil cases filed in the federal district courts during the six months ending October 1, 1994. Selection criteria sought to enhance the likelihood that the attorneys would be familiar with Rule 11 and that we could obtain the attorneys' names and addresses quickly.

First, we excluded from consideration certain types of cases that were unlikely to involve Rule 11, because the attorneys involved in those cases may be relatively unfamiliar with the rule. The cases excluded from consideration were (1) prisoner cases (mainly habeas corpus and actions alleging civil rights violations by prison officials), (2) Social Security cases, (3) forfeiture and penalty actions, (4) bankruptcy matters, (5) foreclosure actions, and (6) actions to recover defaulted student loans or overpayments of veteran's benefits.

Second, we limited the sample to cases filed in thirty-three federal districts, which were identified by randomly selecting half of the sixty-five districts that employ the PACER (Public Access to Court Electronic Records) system. Because the survey needed to be completed quickly, only attorneys from PACER districts were included because of our ability to obtain the sample of attorney names and addresses promptly. For PACER districts, we obtained the docket sheet (including counsel names and addresses) by telephone connection to the court's PACER computer. To obtain names and addresses of counsel for cases in non-PACER districts, we would have had to write to the court requesting photocopies of the docket sheets of the cases in the sample and then enter the name and address information into our computer. This would have required at least four weeks. By restricting the sample to PACER districts, we were able to retrieve the information directly into our computer and have the sample ready in order to mail the questionnaires in less than two weeks.

Limiting the sample of attorneys to those in cases from just thirty-three districts is very unlikely to result in any detectable bias. Because most non-PACER districts are relatively small, the sixty-five PACER districts (71% of the districts) account for 84% of the district courts' civil

11. We are grateful to Frank Leidy of the Center's Planning & Technology Division for suggesting that we experiment with the separate answer sheet format.

caseload. Furthermore, the random selection of half of the PACER districts is unlikely to distort the survey results in a meaningful way.<sup>12</sup>

### **Sample of judges**

The sample of judges selected to receive the questionnaires was chosen both to afford comparability to the sample of attorneys chosen and to provide a representative sample of the district judiciary as a whole. Because the questionnaire sought to compare the extent of problems with groundless filings before and after the 1993 amendments, we restricted the sampling to active judges appointed to the district bench before 1993. Two groups of judges were then selected. One hundred twenty-five judges were selected at random from the thirty-three PACER districts from which the sample of attorneys was chosen, and an additional sample of twenty-three judges was selected from among the non-PACER districts. Thus, the full sample may be regarded as representative of all district judges because the judges were represented in the sample in the same proportions—84% and 16%—as the district courts' caseload is represented by cases from PACER and non-PACER districts.

12. Distortion might occur if Rule 11 is perceived as influencing litigation or does influence litigation very differently from the norm in a few courts and if the sample of thirty-three PACER districts contained more or less than exactly half of such districts. However, even a modest distortion of results that might thus occur is almost certainly irrelevant in this context, where we seek general impressions—not precise measurements—of respondents' perceptions and views regarding Rule 11.

## Appendix B Questionnaire

The judges' version of the questionnaire is reproduced below and on the following pages. Differences in the attorneys' questionnaire are indicated by bracketed text.

### RULE 11 SURVEY PURPOSE AND INSTRUCTIONS

This questionnaire seeks your evaluation of several issues concerning Federal Rule of Civil Procedure 11 (Rule 11) and current Congressional proposals to amend that rule.

This questionnaire is about the effects of Rule 11 in cases in which both sides are represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which one or all parties are proceeding pro se.

Please respond to the questions on the basis of your own experience with cases on your docket, [in federal litigation,] not the experiences of other judges or attorneys [not the experiences of others].

For convenience, throughout this questionnaire we refer to papers that do not conform to the requirements of Rule 11 as *groundless*.

**Please mark your answers to the following questions on the enclosed answer sheet.**

#### 1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? [in which you serve as counsel?] Please mark one.

- a) There is no problem.
- b) There is a very small problem.
- c) There is a small problem.
- d) There is a moderate problem.
- e) There is a large problem.
- f) There is a very large problem.
- g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket [in federal civil cases] larger, smaller, or about the same as it was before Rule 11 was amended on December 1, 1993? Please mark one.

- a) There has never been a problem.
- b) The problem is much larger now than it was then.
- c) The problem is slightly larger now than it was then.
- d) The problem is the same now as it was then.
- e) The problem is slightly smaller now than it was then.
- f) The problem is much smaller now than it was then.
- g) I can't say.



2. **THE SAFE HARBOR PROVISION.** The 1993 amendments to Rule 11 provide that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. If the alleged violation is corrected during this 21 day period, the motion shall not be filed at all. This provision is intended to provide a "safe harbor" so that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party refuses to bring its actions into compliance with Rule 11. **Proposed legislation** would eliminate the "safe harbor" provision.

**Proponents** of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support the inclusion of a "safe harbor" provision in Rule 11? Please mark one.

- a) Strongly oppose
- b) Moderately oppose
- c) Moderately support
- d) Strongly support
- e) I find it difficult to choose because the pros and cons of the "safe harbor" provision are about equally balanced.
- f) I can't say.

2.2 [Asked only of judges] How has the "safe harbor" provision affected the amount of Rule 11 activity on your docket?

- a) Rule 11 activity has increased substantially.
- b) Rule 11 activity has increased slightly.
- c) Rule 11 activity has remained about the same.
- d) Rule 11 activity has decreased slightly.
- e) Rule 11 activity has decreased substantially.
- f) I can't say.

3. **CERTIFICATION STANDARDS FOR FACTUAL ALLEGATIONS.** The 1993 amendments to Rule 11 changed the certification standards for factual allegations to permit not only factual contentions that have evidentiary support at the time of filing, but also factual contentions that are specifically identified as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." **Proposed legislation** would repeal that change, and so require that all factual contentions have evidentiary support at the time of filing.

**Proponents** of the 1993 change argue that it was needed to avoid deterring meritorious filings in which a prefilings inquiry uncovers apparent facts that need discovery or further investigation to provide evidentiary support. **Opponents** argue that the change permits groundless papers to be filed without an adequate prefilings inquiry.

Which of the following actions do you think would be fairest to all parties in the cases with which you are experienced? Please mark one.

- a) Keep Rule 11 as it is (with the 1993 amendment permitting contentions specifically identified as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").
- b) Adopt the proposed legislation (i.e., repeal the 1993 amendment and so require that all factual contentions have evidentiary support at the time of filing).
- c) I find it difficult to choose, because I think the pros and cons of the 1993 amendment are about equally balanced.
- d) I can't say.



4. PURPOSE OF RULE 11 SANCTIONS. The 1993 amendments to Rule 11 provide that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence. In addition, the 1993 amendments direct that the court "may" (rather than "shall") impose a sanction when the rule has been violated.

**Proposed legislation** would alter these standards, making it explicit that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that a sanction be imposed for any violation. **Proposed legislation** would also require that any sanction include an award of attorneys' fees sufficient to compensate the injured party.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket (in your practice).

4.1 What should the purpose of Rule 11 sanctions be? Please mark one.

- a) deterrence (with compensation only when required for deterrence)
- b) compensation only
- c) both compensation and deterrence
- d) other (please specify in the answer space for question 8)

4.2 Should the court be required to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

- a) yes
- b) no
- c) I can't say.

4.3 When a sanction is imposed, should it be mandatory that the sanction include an award of attorneys' fees sufficient to compensate the injured party? Please mark one.

- a) Yes, compensation should be mandatory if a sanction is imposed.
- b) No, compensation should not be mandatory.
- c) I can't say.

5. **APPLICATION TO DISCOVERY.** The 1993 amendments to Rule 11 removed discovery-related activity from the scope of Rule 11 because Federal Rules of Civil Procedure 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. Proposed legislation would amend Rule 11 to once again cover discovery-related activity.

**Proponents** of the 1993 changes argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process. **Opponents** argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless filings than Rules 26(g) and 37 alone.

Based on your experience, which of the following options do you believe would be best? Please mark one.

- a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
- b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
- c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
- d) There is no significant difference among the three options.
- e) I can't say.

6. **OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION.** Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

- a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
- b) Rule 11 is needed, and it is just right as it now stands.
- c) Rule 11 is needed, but it should be modified to better avoid deterring meritorious filings (even at the expense of failing to deter some groundless filings).
- d) Rule 11 is not needed.
- e) I can't say.

7. [Asked only of attorneys] Do you primarily represent plaintiffs or defendants in your civil practice? Please mark one.

- a) almost exclusively plaintiffs
- b) more plaintiffs than defendants
- c) about the same number of plaintiffs and defendants
- d) more defendants than plaintiffs
- e) almost exclusively defendants

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

## THE FEDERAL JUDICIAL CENTER

### BOARD

The Chief Justice of the United States, *Chair*

Judge Bruce M. Selya, U.S. Court of Appeals for the First Circuit

Judge J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit

Judge Marvin E. Aspen, U.S. District Court for the Northern District of Illinois

Chief Judge Richard P. Matsch, U.S. District Court for the District of Colorado

Chief Judge Michael A. Telesca, U.S. District Court for the Western District of New York

Judge Elizabeth L. Perris, U.S. Bankruptcy Court for the District of Oregon

L. Ralph Mecham, Director of the Administrative Office of the U.S. Courts

### DIRECTOR

Judge Rya W. Zobel

### DEPUTY DIRECTOR

Russell R. Wheeler

### DIVISION DIRECTORS

Gordon Bermant, Planning & Technology Division

William B. Eldridge, Research Division

Emily Z. Huebner, Court Education Division

Robb M. Jones, Judicial Education Division

Sylvan A. Sobel, Publications & Media Division

### *About the Federal Judicial Center*

The Federal Judicial Center is the research, education, and planning agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers.

The Judicial Education Division develops and administers education programs and services for judges, career court attorneys, and federal defender office personnel. These include orientation seminars, continuing education programs, and special focus workshops.

The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing technology for information processing, education, and communications. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

The Publications & Media Division develops and produces educational audio and video programs and edits and coordinates the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Center's Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state-federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.

**END**

**06/12/98**